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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHALANDER DENNIS GIVENS,<br><br>Defendant and Appellant. | F068848<br><br>(Super. Ct. No. F11902313)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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Shalander Givens was convicted by a jury on charges of premeditated attempted murder, shooting at an occupied vehicle, and being a felon in possession of a firearm. In a bifurcated bench trial, Givens was found to have suffered three prior strike convictions

(Pen. Code,[1] §§ 667, subds. (b)-(i), 1170.12, subds. (a)–(d)) and all but one of his current offenses were determined to be gang-related for purposes of section 186.22, subdivision (b). He was sentenced to a total prison term of 185 years to life, plus 20 years.

Givens challenges the gang findings in light of the California Supreme Court's decision in *People v. Elizade* (2015) 61 Cal.4th 523 (*Elizalde*), which holds that a defendant's Fifth Amendment rights are implicated when jail personnel ask questions about gang affiliation during the booking process. The prosecution relied heavily on Givens's prior admissions of gang ties during jail classification interviews, and his objections to the use of that evidence were overruled. Givens's arguments on appeal also concern the admission of hearsay during testimony by an investigating officer and the prosecution's gang expert. His position on that issue is supported by the recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Based on the holdings of *Elizalde* and *Sanchez*, we conclude the trial court committed prejudicial error in the bifurcated trial of the gang enhancements.

There is a separate claim regarding the denial of a discovery motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Givens fails to demonstrate error on this point. We reverse the judgment as to the gang findings only, affirm as to all other findings and convictions, and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

Givens was accused of firing multiple bullets into a car occupied by an adult and two children. He was charged by information with three counts of premeditated attempted murder (§§ 187, 664, subd. (a); counts 1-3), one count of shooting at an occupied vehicle (§ 246; count 4), one count of being a felon in possession of a firearm at the time of the shooting (§ 29800, subd. (a); count 5), and one count of being a felon in

[1] Except where otherwise indicated, all further statutory references are to the Penal Code.

possession of a firearm on a separate occasion (count 6). Counts 1, 2, and 4 included enhancement allegations for personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). Count 3 alleged personal and intentional discharge of a firearm in violation of section 12022.53, subdivision (c). Each offense was alleged to be gang-related within the meaning of section 186.22, subdivision (b). Givens faced additional punishment for having three prior convictions that qualified as strikes under California's Three Strikes law.

The defense successfully moved for bifurcation of the gang enhancements and prior strike allegations. Following a mistrial due to a hung jury, the case was retried before a Fresno County jury that ultimately found Givens guilty as charged and returned true findings on the firearm enhancement allegations. A bench trial followed. Due to the nature of the claims on appeal, we provide only an abbreviated summary of the evidence in the second jury trial. Background information on the denial of appellant's *Pitchess* motion is set forth in our Discussion, *post.*

Jury Trial Evidence

On June 25, 2010, victim Antonio Skinner came under gunfire while stopped at a stop sign in southwest Fresno. Mr. Skinner had been driving a black 2006 Chevrolet HHR and was on his way to visit his sister. He was accompanied by his ten-year-old daughter and six-year-old son.

Mr. Skinner was stopped at the corner of South Plumas Street and East Eden Avenue when a large sport utility vehicle (SUV) pulled up next to him and opened fire. He instinctively moved to shield his children and was wounded on the left side of his body. His son was not hit, but one of the bullets struck his daughter in the head and entered her brain, causing serious though non-lethal injuries. Investigators found over twenty 7.62 x 39 mm cartridge casings at the crime scene, which suggested that the perpetrator had used a high-powered assault rifle.

When police spoke to Mr. Skinner about the incident, he described himself as "a father minding his own business" and indicated that the shooting must have been a case of mistaken identity. He had seen two men driving near his sister's neighborhood in the same type of car as his, a black Chevrolet HHR, and suspected they had been the shooter's intended targets. The two individuals were African-American, wore their hair in dreadlocks, and, he believed, were members of a gang from the "Strother" neighborhood, located just a few streets away from his sister's home. Mr. Skinner was not involved in gang activity himself, but had seen these men in the area on prior occasions and knew about "the [type of] people that hang out around there."

The shooting was partially witnessed by a resident of Plumas Street who had looked out of her window after hearing the sound of gunshots. She saw two people in an SUV, including an African-American male who was holding a gun out of the passenger side window. The witness got a good look at the passenger's face, and her eyes were drawn to something on his forehead. She picked Givens out of a photographic lineup the following day, even though police had taken the precaution of obscuring the forehands of the people in the photographs. After later seeing Givens in court, she realized he had a birthmark in the middle of his forehead. The witness identified Givens at the preliminary hearing and again at trial, testifying that she was certain he was the gunman.

On the same day Givens was identified from a lineup, police stopped a black Chevrolet HHR occupied by two people who matched Mr. Skinner's description of the dreadlocked individuals he had seen near his sister's neighborhood. Upon further investigation, it was discovered that both men, Donnie Maiden and Jerell Stanfield, had gotten into a fistfight with Givens and Givens's brother approximately five days prior to the shooting. Based on these facts, the prosecution adopted Mr. Skinner's theory that Givens had mistaken him for someone else because of the distinctive design of his vehicle. Additional evidence placed Givens near the crime scene at the time of the shooting.

Bench Trial Evidence

The prosecution submitted a certified prison packet (§ 969b) to prove the prior strike allegations. The documents showed that Givens had suffered felony convictions in 1997 for aggravated kidnapping (§ 209, subd. (b)) and two counts of first degree robbery (§§ 211, 212.5, subd. (a)). Accordingly, all three prior strike allegations were found to be true.

As to the gang enhancements, the prosecution's case consisted of testimony from four correctional officers, one investigating officer, and a police expert on criminal street gangs of predominately African-American membership in Fresno County. The correctional officers testified to statements Givens had made on previous occasions when booked into the Fresno County jail. The statements were given in response to questions concerning gang affiliation, which had been asked for inmate classification and housing assignment purposes. Givens unsuccessfully objected to the admission of this evidence on grounds that the inquiries were made without advisement of his constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Sergeant Raul Urzua of the Fresno County Sheriff's Office testified about his jail classification interview with Givens in October 2007. Givens reportedly admitted to being affiliated with the "Modoc Diamond Crip" gang at that time. Officer Jack Rocha provided similar testimony regarding a jail classification interview from April 2008. In that instance, Givens claimed affiliation with the "Modoc" gang. His admissions were made during a routine booking procedure that required responses to a pre-printed questionnaire, which asked, "Do you associate with any street/prison gangs?" Givens verified his responses by signing the completed questionnaires at the time of booking. The questionnaires were entered into evidence. There was no evidence that Givens received *Miranda* warnings prior to making these admissions.

Officer Joe Papagni testified to statements made by Givens during a June 2008 jail classification interview. On that occasion, Givens denied having any gang ties. Despite

the denial, Officer Papagni reviewed records of Givens's prior jail visits and noted his past admissions of affiliation with the Modoc gang.

Officer Eulalio Gomez booked Givens into jail on June 28, 2010 following his most recent arrest. According to a signed questionnaire, Givens admitted to being a "Modoc gang member" during the jail classification interview, and stated in response to a related question that he would anticipate problems if housed with "Twump" associates. Officer Gomez had no independent recollection of speaking with Givens, but testified that he would not have advised Givens of his *Miranda* rights prior to asking him questions about gang membership.

The lead detective in the case, Conrado Martin, was called to testify about an interview he conducted with Donnie Maiden regarding Maiden's encounter with Givens a few days prior to the shooting. Defense counsel objected on grounds that such testimony constituted inadmissible hearsay and violated Givens's constitutional right to confront adverse witnesses. The trial court overruled the objections, accepting the prosecution's argument that Maiden's purported statements were not being offered for their truth, but merely as "foundation" evidence that would later be relied upon by the gang expert. Detective Martin proceeded to explain how Maiden had said the earlier incident started out as a verbal dispute between him and Givens's brother, Wendell Moton, and escalated to a physical altercation. Givens attempted to assist his brother and ended up fighting with Jerell Stanfield, who was with Maiden when the fight began and allegedly got the better of Givens after the two of them exchanged punches. Maiden told Detective Martin that he and Stanfield had been in a black Chevy HHR on the day of the fight, which implied that Givens would have associated them with that type of car. When the fight broke up and the groups were going their separate ways, Givens allegedly told someone to "get the chop." Detective Martin testified that "chop" is a common street term for "gun."

Officer Ron Flowers of the Fresno Police Department testified as the prosecution's gang expert. According to his testimony, the African-American-based criminal street gangs in Fresno generally identify with one of two rival alliances, which are known as "MUG" and "Twump" (also spelled "Twamp" or Twomp"). The name MUG is an acronym derived from the unification of three different gangs: the Modoc Boys, the U Boys, and the Garrett Street Mob (aka Garrett Street Posse). Elaborating on the composition of the Modoc Boys, the expert testified that its members are "primarily Crip-based 6 Deuce Diamond." The "6 Deuce" nomenclature is relevant in the state prison system as a geographic identifier, signifying that a person is connected to the Fresno area. Geographic background apparently takes precedence over one's specific hometown gang in a prison setting, but in the local county jail, members of predominately African-American gangs are typically segregated based on their affiliation with MUG or Twump.

The Twump alliance includes a gang called the Strother Boys, aka "Strother," which is a rival of the Modoc Boys. Officer Flowers testified to having personal knowledge that Jerell Stanfield is a member of the Strother Boys. He was aware of Stanfield's gang membership through previous encounters with him, in addition to his reliance upon a variety of other evidentiary sources.

Officer Flowers was not personally acquainted with Givens, but nevertheless opined that Givens was an active member of the Modoc Boys at the time of the shooting. In explaining the basis for his opinion, the expert testified to the contents of police reports and also cited the statements made by Givens during jail classification interviews. Defense objections to the admission of this testimony were overruled.

Responding to hypothetical questions intended to mirror the facts of the case, Officer Flowers opined that the crimes were committed for the benefit of a criminal street gang. His opinion was based on the gang ties of the shooter and intended victim, the earlier altercation between those individuals, the type of weapon involved, and the fact that the drive-by shooting took place at a location within the traditional gang territory of

the Strother Boys. Whereas Detective Martin had previously testified that "chop" is street slang for "gun," Officer Flowers clarified that the term refers to a specific type of firearm, i.e., "a rapid-fire machine gun," like the one used in the shooting. This type of weapon is considered "a special tool" within African-American-based gang culture in Fresno, and its use in the crime reflected a level of retaliatory violence designed to "send a message" to the rival group and "elevate" the status of the shooter and his gang.

Givens testified on his own behalf. He denied membership or affiliation with the Modoc Boys and provided additional facts regarding the fight with Donnie Maiden and Jerell Stanfield. He claimed the fight had nothing to do with gangs, but rather a personal dispute between Maiden and his brother Wendell over a woman. Givens arrived on the scene after the argument had turned physical, intervened to protect his brother, and ended up in a fistfight with Stanfield. On cross-examination, Givens conceded that he was "born into" membership in a local gang called the Diamond Crips, but testified that he had abandoned all gang activity after serving a lengthy prison sentence for his prior felony convictions.

Wendell Moton also testified for the defense. He denied that the incident with Donnie Maiden and Jerell Stanfield was gang-related. Once the fight was over, there was never any discussion of retaliation.

The trial court took the matter under submission after closing arguments and returned its verdict the following day. The gang enhancement allegations were found true as to counts 1-5, but not true with respect to count 6. The latter count was based on statements by a witness who had seen Givens in possession of a machine gun on or about June 11, 2010, which was well before his fight with Jerell Stanfield and the subsequent drive-by shooting.

Sentencing

Each of Givens's convictions for premeditated attempted murder was punishable by an indeterminate life sentence with a minimum parole ineligibility period of seven

years. (§§ 187, 664, subd. (a), 3046.) Because of the gang findings, sentencing for counts 1-3 was imposed pursuant to the alternate penalty provision in section 186.22, subdivision (b)(5), which requires a prison term of 15 years to life. Pursuant to certain parts of the Three Strikes law (§ 667, subd. (e)(2)(A)(i)-(iii)), each of those terms was tripled, resulting in consecutive base terms of 45 years to life for counts 1-3. The separate firearm enhancements under section 12022.53, subdivision (d) added consecutive terms of 25 years to life to counts 1-2, and the section 12022.53, subdivision (c) enhancement added a consecutive 20-year determinate term to count 3, thereby resulting in a total prison sentence of 185 years to life, plus 20 years. The trial court imposed a stayed sentence for count 4 and concurrent sentences for counts 5-6.

## DISCUSSION

### Gang Enhancement Findings

Section 186.22, subdivision (b) provides for increased punishment when an offense is committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Although gang membership is not an element of the enhancement, proof that a defendant belonged to a particular gang often goes a long way toward establishing that a crime was committed for the benefit of a gang. (See *Sanchez, supra*, 63 Cal.4th at pp. 698-699.) With regard to the evidence of his own gang ties, Givens alleges prejudicial error based on a violation of his *Miranda* rights and the prosecution's reliance on testimonial hearsay. Givens also challenges the gang findings for lack of sufficient evidence. As we explain, the gang findings on counts 1-5 must be reversed, but there is sufficient evidence in the record to allow for a retrial of those enhancement allegations should the prosecution wish to pursue the matter further on remand.

The *Elizalde* Decision

During the pendency of this appeal, the California Supreme Court issued its decision in *Elizalde, supra,* which addresses and resolves the *Miranda* issue raised by Givens. It is now settled that the Fifth Amendment right against self-incrimination is implicated when law enforcement officers ask "routine questions about gang affiliation" while processing a defendant into jail. (*Elizade*, *supra*, 61 Cal.4th at p. 527.) Such questions may be asked for institutional security purposes, but a defendant's "un-*Mirandized*" responses will generally be inadmissible against him or her in a criminal trial. (*Ibid*.)

The *Elizalde* decision represents a significant change in the law. Previously, in *Pennsylvania v. Muniz* (1990) 496 U.S. 582 (*Muniz*), a plurality of the United States Supreme Court recognized "a 'routine booking question' exception" that removes from the scope of the *Miranda* rule questions asked "to secure the ' "biographical data necessary to complete booking or pretrial services." ' " (*Id*. at p. 601 (plur. opn. of Brennan, J.).) The court cautioned that " 'recognizing a "booking exception" to *Miranda* does not mean . . . that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.' " (*Id*. at p. 602, fn. 14.) California courts later interpreted *Muniz* and the phrase " '*designed* to elicit incriminatory admissions' " as establishing a subjective test for determining whether booking questions qualify as custodial interrogation for purposes of *Miranda*. (*People v. Gomez* (2011) 192 Cal.App.4th 609, 628-629 (*Gomez*).) Consequently, gang affiliation questions posed during jail booking procedures came to be viewed as " 'reasonably related to the police's administrative concerns' " and exempt from the requirements of *Miranda* so long as they were not asked as "a pretext for eliciting incriminating information." (*Id*. at pp 630, 634-635, italics omitted.)

Rejecting the *Gomez* line of authority, *Elizalde* holds that gang affiliation questions "do not conform to the narrow exception contemplated in [*Rhode Island v. Innis* (1980) 446 U.S. 291 (*Innis*)] and *Muniz* for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' " (*Elizalde*, *supra*, 61 Cal.4th at p. 538.) The subjective intentions of the questioner do not excuse a failure to provide *Miranda* warnings when, from an objective standpoint, the questions are reasonably likely to evoke incriminating statements from the arrestee. (*Id*. at pp. 536-537, 540.)

Section 186.22 was enacted almost 30 years ago as part of the California Street Terrorism Enforcement and Prevention Act. (*People v. Jones* (2009) 47 Cal.4th 566, 570.) Given the ubiquitous inclusion of section 186.22, subdivision (b) enhancements in cases involving crimes committed by gang members, and the common prosecutorial strategy of using jail classification admissions to prove a defendant's gang membership, asking Givens to divulge and explain the existence of any gang ties was reasonably likely to elicit an incriminating response. (See *Elizalde*, *supra*, 61 Cal.4th at pp. 538-539.) As such, it was error for the trial court to allow the gang affiliation admissions to be used against him at trial without proof that the statements were made following an advisement and waiver of his *Miranda* rights. (*Miranda*, *supra*, 384 U.S. at pp. 444-445; *Elizalde*, *supra*, 61 Cal.4th at p. 531.)

Respondent argues that Givens's jail classification interview on June 28, 2010 was conducted during a "reasonably contemporaneous" time period in relation to a *Miranda* advisement and waiver that occurred at the time of his arrest. "To establish a valid *Miranda* waiver, the prosecution bears the burden of establishing by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation." (*People v. Linton* (2013) 56 Cal.4th 1146, 1171.) In cases where the defendant received a prior admonishment and submitted to police

questioning, relevant factors include " 'the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights.' " (*People v. Pearson* (2012) 53 Cal.4th 306, 316-317.)

Here, the prosecution's evidence showed that Givens was *Mirandized* at approximately 9:30 p.m. on June 27, 2010 at the headquarters of the Fresno Police Department by one of the department's homicide detectives. A jail classification interview took place approximately six hours later at the county jail and was conducted by someone from the Fresno County Sheriff's Office. Several factors weigh in Givens's favor, including the unlikelihood that he understood the extent of his rights. Pre-*Elizalde*, an arrestee would not have known that his *Miranda* rights extended to booking questions about gang affiliation. Since Givens had no reason to believe he could refuse to answer routine booking questions, his admission of gang membership was not the product of a knowing and intelligent waiver of his right to remain silent. Furthermore, the prosecution unquestionably failed to meet its burden with respect to Givens's statements from the jail classification interviews conducted in 2007 and 2008. Therefore, we agree with appellant on the issue of *Miranda*/*Elizalde* error.

The *Sanchez* Decision

Givens's second claim involves the hearsay rule under state law and the constitutional right of confrontation as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). "Hearsay is an out-of-court statement that is offered for the truth of the matter asserted, and is generally inadmissible." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) The right of confrontation, as guaranteed by the Sixth Amendment to the federal Constitution and made applicable to the states through the Fourteenth Amendment, ensures the opportunity for cross-examination of adverse witnesses. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) In *Crawford*, *supra*, the

United States Supreme Court held that the confrontation clause bars the admission of out-of-court testimonial hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine that person. (541 U.S. at p. 59.)

Until earlier this year, an expert witness could testify about out-of-court statements upon which they had relied in forming their opinions, even if the statements would have otherwise been inadmissible under the hearsay rule. Case law held that such evidence was not offered for its truth, but only to identify the foundational basis for the expert's testimony. (E.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-620 (*Gardeley*); *People v. Miller* (2014) 231 Cal.App.4th 1301, 1310.) Pursuant to this rationale, appellate courts deemed the use of out-of-court statements within an expert's "basis" testimony to be compliant with the requirements of *Crawford*. (*People v. Valadez* (2013) 220 Cal.App.4th 16, 30.)

In *Sanchez*, *supra*, the California Supreme Court held that a trier of fact must necessarily consider expert basis testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the Sixth Amendment right of confrontation. (63 Cal.4th at p. 684.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay.... If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686, fn. omitted.)

The admissibility of an expert's basis testimony depends on whether it includes "case-specific facts," meaning "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) If it does, the next question is whether such facts are presented in the form of testimonial hearsay. (*Id*. at pp. 680-681, 685.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like

trial testimony." (*Id*. at p. 689.) Information contained in a police report will generally be considered testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*Id*. at p. 694.)

The admissibility of Detective Martin's testimony concerning out-of-court statements made by Donnie Maiden was doubtful under the then-controlling authority *Gardeley* and its progeny since the detective did not testify in an expert capacity. The prosecution essentially conceded that the sole purpose of his testimony was to introduce hearsay that would later be relied upon by the gang expert, Officer Flowers. When we apply the holdings of *Sanchez*, it is apparent that the defense objections should have been sustained. The statements attributed to Maiden qualified as "case-specific facts" and satisfied the definition of testimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 676-677, 688, 694; see *Crawford, supra*, 541 U.S. at p. 52 ["Statements taken by police officers in the course of interrogations are [] testimonial under even a narrow standard."].) Therefore, Detective Martin's testimony during the bench trial was inadmissible under the hearsay rule and violated appellant's confrontation rights under *Crawford*.

Much of the testimony by Officer Flowers was also inadmissible. The *Sanchez* opinion makes clear that a gang expert cannot testify to information obtained from police reports and other sources of hearsay that is outside of their personal knowledge to establish the defendant's membership in a gang. (*Sanchez, supra*, 63 Cal.4th at pp. 685-686, 694-698.) If the expert relates as true case-specific facts asserted in hearsay statements, those facts must be "independently proven by competent evidence or [] covered by a hearsay exception." (*Id*. at p. 686.) The portions of Officer Flowers's testimony containing background information about local gangs and his personal knowledge of Jerell Stanfield's gang membership was admissible, but his summaries of hearsay evidence regarding Givens's gang membership were not. (*Id*. at pp. 676-677, 685-686, 694-698.)

Prejudice and Remedy

The erroneous admission of a jail classification statement obtained in violation of *Miranda* is reviewed for prejudice under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18. (*Elizalde, supra,* 61 Cal.4th at p. 542.) The same standard applies when an expert witness offers testimonial hearsay to explain the basis for his or her opinions without independent proof of the matter asserted in the hearsay. (*Sanchez, supra,* 63 Cal.4th at pp. 670-671, 698.) The test is whether it can be shown, beyond a reasonable doubt, that the errors did not contribute to the verdict. (*Elizalde, supra*, 61 Cal.4th at p. 542.) We must consider "not only the evidence that would support the judgment, but also the impact of the inadmissible evidence on the final outcome." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 884.)

The foregoing analysis reveals that most of the prosecution's case was based on inadmissible evidence. Had appellant's *Miranda* objections been sustained, the four correctional officers would not have been allowed to testify about his prior admissions of gang affiliation, and the signed jail classification questionnaires would not have been admitted into evidence. Virtually all of Detective Martin's testimony consisted of inadmissible hearsay. The expert witness, Officer Flowers, was competent to testify only as to the background information about local gangs and his personal knowledge of Jerell Stanfield's membership in the Strother Boys gang. His opinions regarding Givens's membership and association with criminal street gangs were based on testimonial hearsay and the inadmissible jail classification interviews. Under these circumstances, we cannot say the errors complained of were harmless beyond a reasonable doubt.

Respondent disputes the prejudicial impact of the errors in light of Givens's testimony on cross-examination about being a member of the Diamond Crips. The problem with this argument is that Givens would have had no reason to testify had his evidentiary objections been properly sustained. The guiding principles are set forth in *Harrison v. United States* (1968) 392 U.S. 219: "The question is not *whether* the

[defendant] made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible…. 'If the improper use of [a] defendant's extrajudicial confession impelled his testimonial admission of guilt, . . . we could not, in order to shield the resulting conviction from reversal, separate what he told the jury on the witness stand from what he confessed to the police during interrogation.' " (*Id*. at pp. 223-224, quoting *People v. Spencer* (1967) 66 Cal.2d 158, 164, fn. omitted; see *People v. Louis* (1986) 42 Cal.3d 969, 995 [finding prejudice where the record failed to dispel beyond a reasonable doubt the possibility that the defendant's testimony was " 'impelled by the erroneous introduction' " of inadmissible evidence].) Givens took the stand to refute the prosecution's evidence of his prior admissions, particularly with respect to his affiliation with the Modoc Boys, and it is reasonably doubtful that he would have testified at all but for the overruling of his earlier objections. It follows that the errors were prejudicial.

Turning to the issue of remedy, it is settled that "where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34.) We must determine whether, regardless of prejudicial error under *Elizalde* and *Sanchez*, the prosecution presented substantial evidence in support of the section 186.22, subdivision (b) enhancement allegations. This entails a review of the record in the light most favorable to the judgment, accepting as true all evidence that is reasonable, credible and of solid value such that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224 [this standard of review "applies to a claim of insufficiency of the evidence to support a gang enhancement"].)

"Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of … a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*People v. Albillar* (2010) 51 Cal.4th 47, 63.) The record discloses substantial evidence that Givens and his intended target, Jerell Stanfield, were members of rival criminal street gangs. The prosecution's gang expert testified that the manner in which the crime was committed bore the hallmarks of a gang-related offense, i.e., a drive-by shooting carried out by one gang member against a rival gang member in the rival's territory, and the firing of excessive rounds from a high-powered firearm to "send a message" and instill fear in the intended target as well as his gang. Viewed in the light most favorable to the prosecution, the evidence as a whole was sufficient to prove the gang enhancement allegations in counts 1-5, which thus allows for a retrial of those charges.

**Denial of *Pitchess* Motion**

In *Pitchess, supra,* the California Supreme Court held that criminal defendants have a limited right to the discovery of peace officer personnel records in order to ensure "a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess, supra,* 11 Cal.3d at p. 535.) The process for obtaining such discovery is set forth in sections 832.7 and 832.8, and Evidence Code sections 1043 through 1045. (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.) "The procedure requires a showing of good cause for the discovery, an in camera review of the records if good cause is shown, and disclosure of information 'relevant to the subject matter involved in the pending litigation.' " (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316 (*Thompson*), quoting Evid. Code, § 1045, subd. (a).)

Givens filed a motion to obtain discovery of personnel records for three detectives employed by the Fresno Police Department. The trial court concluded that Givens failed to establish good cause for an in camera review of the requested documents. Givens now

challenges the trial court's ruling. The available remedy for this type of claim is a conditional reversal and remand for the trial court to conduct an in camera review of the subject material. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.) For the reasons that follow, we find no error in the trial court's denial of the *Pitchess* motion.

Additional Background

Givens was on parole at the time of his arrest. His parole officer authorized a parole hold and search of his residence, which yielded a cell phone containing potentially incriminating text messages. One particularly suspicious message had been sent to a phone number ending in "3778." Police later obtained a search warrant for all telephone records of the subscriber connected to the 3778 number during the week of June 20, 2010 to June 27, 2010. Detective Richard Tacadena submitted an affidavit in support of the search warrant application, and his affidavit contained the following statements:

> During a search of Shalander's residence a cell phone belonging to him, and bearing [his phone number], was located in the living room. Within the phone text messages sent by Shalander were found. Some of the text's [*sic*] were sent to unknown parties, [including the 3778 number], on the day that the victims were shot. One text described Shalander being in South-West Fresno looking to kill someone[,] while another text described Shalander having a broken hand and wondering if he could still shoot a gun. Investigators believe Shalander Givens is responsible for the attempted murder of three occupants inside the victim vehicle possibly because he mistook the victims for the person he recently had a fight with. Investigators also believe that at least one other person was with Shalander when the shooting took place and that a

> key element into identifying this individual lays within the cell phone records.

The quoted excerpt from Detective Tacadena's affidavit summarizes the contents of several text messages found on Givens's phone. The first message was transmitted on June 23, 2010 at 9:53 p.m.: "Hey cuzo whats good just left hospital me and [my brother Wendell] fighting some creeps. [*Sic*]" Three minutes later, he added: "Cuz its on fuc these nigas whenever u ready […][*Sic*]" A follow-up message was sent at 10:00 p.m.: "I havent been mobile i would have been by! my hand so fuced up i wonder if i can shoot. [*Sic*]." Another message was sent on June 25, 2010 at 5:09 p.m., approximately three hours prior to the shooting in this case. It read: "On the west! in the cut to kill a mut. [*Sic*]"

During Givens's first trial, defense counsel asked Detective Tacadena if he had actually seen the text messages referenced in his affidavit. The detective testified that he was present when Givens's cell phone was seized, but could not recall whether he viewed the messages himself or was advised of their contents by his colleagues, Detectives Andre Benson and Conrado Martin. Detective Benson had confronted Givens about these text messages during a custodial interview that was conducted several weeks prior to the preparation and submission of Detective Tacadena's affidavit. When asked to explain the meaning of his texts, including the statement about being "in the cut to kill a mut," Givens told Detective Benson that he was using street slang, but had no explanation for what his words actually meant ("I don't know"). Detective Martin later contacted the recipient of Givens's message about being able to "shoot," and questioned the person about the meaning of that statement. The man claimed to be unaware of what Givens had been trying to convey to him. Detective Martin's questioning of this individual also occurred prior to the submission of Detective Tacadena's affidavit.

The *Pitchess* motion highlighted two discrepancies between the synopsis in Detective Tacadena's affidavit and the verbatim language of the text messages. The main

point of contention was the detective's claim that one of the messages "described Shalander having a broken hand and wondering if he could still shoot a gun." Defense counsel noted that the verb "shoot" can refer to conduct that does not involve the use of a gun. Since the actual text message did not contain the word "gun," counsel argued that Detective Tacadena's paraphrasing of the message was a "fabrication of evidence." The same argument was made with respect to the detective's interpretation of "to kill a mut" as meaning "to kill someone." (*Ibid*.) Based on this purported showing of good cause, Givens requested all documents in the personnel records of Detectives Benson, Martin, and Tacadena that contained allegations of "improper tactics, dishonesty[,] false police reports, moral turpitude, and illegal search and seizure." Although it was Detective Tacadena who had allegedly made material misrepresentations in the search warrant affidavit, the records of Detectives Benson and Martin were requested pursuant to the theory that they intentionally misinformed Detective Tacadena about the contents of the text messages.

The Fresno Police Department opposed the *Pitchess* motion on grounds that Givens had "failed to meet the minimum standard required to allow an in camera examination" of the requested documents. The opposition pointed out that the search warrant affidavit did not purport to recite exact quotations of the messages found on Givens's phone. The police department further maintained that Detective Tacadena's sworn statements were in fact an "accurate representation of what text messages said[,] even though paraphrased." The department likewise asserted that the evidence showed "no factual scenario at all to support any misrepresentations by either Detective Martin or Detective Benson."

The trial court's ruling is documented in the reporter's transcript as follows: "After reading the motion, as well as the response thereto, and reviewing the law, the Court finds that [the] defense has not made the requisite finding of good cause as articulated with respect to officers Detective Benson and Detective Martin. As to the motion with

respect to Detective [Tacadena], the Court is mindful of the fact that good cause requirement [*sic*] also requires the information sought to be relevant. And insomuch as the defense articulates the relevance to be – or as far as the material would be pertaining to Detective [Tacadena], it was the assertion of defense of suppression of evidence. [*Sic.*] As to the search of the third party phone records, the Court believes that they have not established that Mr. Givens has established his own reasonable expectation of privacy was violated by the search of those third party phone records. Therefore, they have also failed to make the good cause showing required by [*Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*)] as to Detective [Tacadena], as well. Therefore, the motion is denied."

The trial court's comment about "suppression of evidence" was in reference to Givens's then-pending motion to traverse the search warrant for phone records connected to the 3778 number, which was based on the same arguments presented in support of the *Pitchess* motion. The remark concerning a lack of privacy rights vis-à-vis third party phone records was an apparent conflation of the People's arguments in opposition to the motion to traverse. Incidentally, the trial court later denied the motion to traverse and found that Givens had made "no showing" that the statements in Detective Tacadena's affidavit were deliberately false or reckless. The court also ruled that the disputed paraphrasing was immaterial because probable cause to issue the warrant would have been found even in the absence of the words "gun" and "someone."[2]

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[2] A motion to traverse challenges the veracity of statements made in a search warrant application. (*People v. Heslington* (2011) 195 Cal.App.4th 947, 957, fn. 7.) The defendant must generally show "(1) the affidavit contained 'a false statement made "knowingly and intentionally, or with reckless disregard for the truth;" and (2) "the allegedly false statement is necessary to the finding of probable cause." ' " (*Ibid.*) "Facts omitted from a search warrant affidavit are 'not material' if 'there is no "substantial possibility they would have altered a reasonable magistrate's probable cause determination," and their omission did not "make the affidavit[s] *substantially misleading*." ' " (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 768, quoting *People v. Eubanks* (2011) 53 Cal.4th 110, 136.)

Analysis

"Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records." (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) Accordingly, a trial court's decision to deny a *Pitchess* motion is reviewed for abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) "[A]buse of discretion implies arbitrary determination, capricious disposition or whimsical thinking where the court exceeds all bounds of reason, all of the circumstances being considered." (*People v. Pitcock* (1982) 134 Cal.App.3d 795, 801; accord, *People v. Galan* (2009) 178 Cal.App.4th 6, 13.)

Despite the confusing statement about Givens's lack of privacy rights in third party cell phone records, the trial court's reference to *Warrick, supra,* indicates its familiarity with the applicable law. The *Warrick* opinion explains the requirements for a showing of good cause on a *Pitchess* motion. The case holds that the moving party must identify "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent [evidence]." (*Warrick, supra*, 35 Cal.4th at p. 1025.) The question here is whether the trial court could have reasonably concluded that Givens failed to state a plausible allegation of misconduct by Detectives Benson, Martin, and/or Tacadena.

When considering the issue of good cause, a trial court is permitted to rely on common sense and make "determinations based on a reasonable and realistic assessment of the facts and allegations." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992 [trial court did not abuse its discretion by denying *Pitchess* motion that was based on "grandiose" conspiracy allegations].) Under the totality of the circumstances, it was within the trial court's discretion to conclude that the detectives' paraphrasing of Givens's text messages did not constitute acts of misconduct. In his briefs, Givens cites to evidence that "mut" can be used as an acronym in street slang when referring to a woman wearing clothing that accentuates certain physical characteristics. Assuming this is true, a provocatively

dressed female is a person, and therefore it would have still been accurate to interpret the phrase "to kill a mut" as meaning "to kill someone." As for the text about his ability to "shoot," Givens claims the detectives disregarded the possibility that "the texts could have referred to archery[,] such as to shoot *an arrow*, or … to shooting *paintballs*." While his use of the word "shoot" was open to interpretation, it was not outside the bounds of reason for the trial court to conclude that the detectives' more contextually logical and realistic paraphrasing of that message did not amount to police misconduct. Therefore, the court did not abuse its discretion by denying the motion for lack of good cause.

## DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for further proceedings. The section 186.22, subdivision (b) enhancement findings for counts 1, 2, 3, 4, and 5 are reversed. The judgment is affirmed as to all other convictions and findings.

The prosecution shall have the option to retry the gang enhancement allegations on counts 1-5. If the prosecution elects not to retry those allegations, the trial court shall resentence Givens accordingly.

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GOMES, J.

WE CONCUR:

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HILL, P.J.

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PEÑA, J.